IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 6, 2007

MARILYNN DIANE GALLOWAY v. JOHN ASHLEY GALLOWAY

Appeal from the Chancery Court for Dickson County
No. 7814-02 Leonard W. Martin, Judge

No. M2004-02608-COA-R3-CV - Filed on July 27, 2007

This case is a divorce proceeding in which the only issues brought before this Court are whether the preponderance of the evidence support the trials court's division of property between the parties and whether either party is entitled to attorney's fees on appeal. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Clark Lee Shaw, Nashville, Tennessee, for the appellant, John Ashley Galloway.

Larry Samuel Patterson, Jr., Columbia, Tennessee, for the appellee, Marilynn Diane Galloway.

OPINION

Marilynn Diane Galloway ("Appellee") and John Ashley Galloway ("Appellant") were married June 22, 1990, and are the parents of twin daughters born January 18, 1991. The proceedings in the trial court were contentious with a Decree of Divorce entered September 24, 2004, following a hearing of August 27, 2004. John Ashley Galloway appeals only issues related to property division and attorney's fees, such being:

1. Whether the preponderance of the evidence supports the Trial Court's division of property between the parties and whether the distribution so ordered is equitable.
2. Whether the Appellant is entitled to his attorney fees for this appeal.

Appellee asserts only an entitlement to attorney's fees on appeal.

Both parties, in brief on appeal, adopt the pertinent findings of fact made by the Special Master and approved by the trial judge, which are:

1. Prior to the marriage, Mr. Galloway:

(i) Owned and operated a hunting and supplies store, called Bear Creek Shooter's Supply. He began the business in 1980, ten years prior to the marriage. At the time of marriage, the store was full of inventory and had no debts. However, husband was unable to provide the pre-marital value of the inventory or his business account. From 1990 to 1995 the store was the sole source of the parties marital income. Money earned from gun shop prior to and during the marriage went into a flexible investment account he had maintained at First Farmers Bank and created a balance of $313,139. During the marriage, from 1990 to 1995, he averaged over $100,000 per year selling and doing repairs. He was unable to establish what portion of the money in said account was earned prior to or during the marriage. Mr. Galloway's pre-marital separate accounts (i.e.. checking account #64108113 for Bear Creek Shooter's and a flexible investment account #4039408 with Farmers and Merchants Bank) were eventually closed in 1998; and any remaining funds went into joint marital accounts.

(ii) Additionally, prior to the marriage, he owned 67 acres in Maury County at Santa Fe. He had bought it prior to the marriage in November 1989 for $44,500 and later sold it during the marriage on December 5, 1995 for $65,000; and placed the proceeds in joint marital account.

(iii) Mr. Galloway also owned a John Deer farm tractor prior to the marriage. He had bought it for $7500 when he purchased the Sante Fe property. He sold it during the marriage when they moved to Idaho; and put the proceeds in a joint marital account.

2. Prior to the marriage, Ms. Galloway resided at 2805 Mere Drive, Columbia, TN. She had acquired half of the equity interest in said property from a prior divorce. The value of the pre-marital equity interest was not established.

3. On June 22, 1990, the parties were married. The parties resided at ***2805 Mere Drive, Columbia, TN***. This was the residence Ms. Galloway had acquired ½ equity interest in from a previous divorce. After the parties' marriage in 1990, Mr. Galloway supplied $12,000 of his pre-marital funds to buy out her previous husband's equity interest in said home, and the parties continued to pay on the outstanding mortgage. Additionally, the parties installed a new central heat and air unit, had the shower completely retiled, put on new roof, painted inside and outside, bought new appliances, installed new kitchen flooring and carpet, and installed new toilet fixtures.

4. On August 13, 1991, a Deed Creating Tenancy by the Entireties in the Columbia property was executed. Said deed converted the wife's fee simple interest in the 2805 Mere Drive, Columbia property into an estate by the entireties in John and Diane Galloway.

5. In August 1995, the parties purchased an home in Idaho. Specifically, on August 7, 1995, Mr. Galloway used his Bear Creek Shooter's business account (First

Farmers & Merchants #064108113) and paid $5,000 in earnest money toward the purchase of a home at 1250 Coterell in Boise, Idaho. Mr. and Mrs. Galloway ***purchased the Idaho home for $157,000*** and moved to Boise, Idaho. The parties paid cash for the home and did additional remodeling on it as well. Husband had withdrawn $150,379 from the account that was in his sole name that had a beginning balance of $313,139.

6. In September 1995, husband sold his business. He had kept and maintained his business accounts in his sole name. (ie.. husband's business and personal bank accounts kept separate in his name alone. He was unable to establish the amount received from the sale of business.

7. On October 16, 1995, the parties sold their Columbia residence. John and Diane Galloway sold the residence located at 2805 Mere Drive, Columbia, TN to Ralph G. Maddux, III for a contract price of $100,000. From said amount, after deductions [listed in the Special Master's Report, R. 80], the John and Diane Galloway, ***received $58,494.65*** ($5,000 earnest money + $53,494.65 at closing = $58,494.65) Proceeds from Columbia house sale went back into joint marital account.

8. In December 1995, husband sold his pre-marital Sante Fe property for $65,000 and netted in excess of $60,000.

9. In September 1996, the parties purchased a Cookeville, TN residence. Approximately a year later in September 1996, upon contracting to sell the Idaho residence, the parties moved from Idaho to Cookeville, Tennessee. However, they did not close on the Idaho home until after purchasing the Cookeville home. The parties ***paid $135,000 from a joint account for the Cookeville home***.

. . .

13. . . . Mr. and Mrs. Galloway and the children moved to Burns, Tennessee. The property was deeded in John A. Galloway's name only. The closing statement indicated ***the total purchase price was $133,000***. At this time, the prior divorce case was pending, but the parties were back together. Husband put the property in his name over wife's objection. Husband stated "she never objected to it cause I told her at the outset when we were reconciling we were going to buy another house and that's the way it was going to be and if she didn't like it we wouldn't reconcile, we would proceed with the divorce ..."

14. In August 2000, the parties sold their Cookeville residence. On August 22, 2000, the parties contracted to sell the 550 Crestwood Drive, Cookeville, TN residence for $146,900 and received $1,000 in earnest money. On 09/14/22, the parties closed on the 550 Crestwood Drive, Cookeville, TN property and ***netted $136,416.24*** at closing. The funds were put in joint savings account #100154685 at First Tennessee on 9/20/00.

15. On September 22, 2000, Ms. Galloway withdrew $68,000 from said First Tennessee joint savings account. The balance remaining as of 10/06/00 was

$68,231.79. She also withdrew an additional $3000 to pay taxes. Mr. Galloway removed the remaining $65,300, and put it in an account in his name alone.

16. In October 2000, the Wife purchased an Alabama residence. On 10/04/00, Ms. Galloway contracted to purchase home and 3 acres in Alabama for $50,000 and paid $500 in earnest money. On 10/11/00, Diane Galloway closed on the residence at 6547 Co. Rd. 89, Lauderdale County, Alabama. ***She paid $50,032.00*** at closing; and said property was deeded in her name alone. Ms. Galloway and the children moved to Lexington, Alabama in October 2000. Ms. Galloway spent an additional $16,500 to improve the Alabama property.

17. In December 2000, Mr. Galloway withdrew the remaining funds $66,311.64 from the First Tennessee joint savings acct. #100154685. On 12/04/00, John Galloway withdrew $65,311.64 from said First Tennessee savings account. The balance remaining as of 12/08/00 was $214.37, the interest earned that month.

18. On 01/19/01, an Agreed Order of Dismissal in prior divorce case filed in Maury County #99-107 that stated the parties announced that "all matters and things in controversy between them have been settled".

19. In December 2001, the parties reconciled. After living two months in Alabama, Ms. Galloway moved back to the Burns, Tennessee residence with Mr. Galloway; and remained there until the current separation date of June 2002.

20. In June 2002, the parties separated for the third time. Ms. Galloway moved from the Burns residence to Columbia, filed for divorce and sold the Alabama residence. Ms. Galloway moved to Columbia, Tennessee, filed for divorce and listed the Alabama property for sale. ***She sold said Alabama property for $66,500***. On 06/30/02, Diane Galloway contracted to sell Alabama property for $68,000. On 07/24/02, Diane Galloway closed on 6547 County Road 89, Lexington, AL property. She netted $66,500. She then deposited said sum in First Farmers & Merchants National Bank savings account #004965185 titled in her name alone on 7/30/02. The initial deposit of the Alabama proceeds was $66,500. As of 06/30/03, the balance on First Farmers & Merchants National Bank acct.#4965185 was $65,459.01. The court has allowed Ms. Galloway to withdraw $200 a month from this account during current separation for living expenses.

All parties, having agreed with the foregoing findings of fact of the Special Master, and the trial court having concurred therein, we next address the conclusions made by the Special Master in his extensive report wherein he classifies the property of the parties.

> Generally the proof presented as to the classification and valuation of the parties' property was either uncontradicted, substantially the same or agreed upon by the parties with the major exceptions being the (i) classification of marital residence and (ii) the classification of the bank accounts. The defendant / husband asserts the marital residence and his bank account should be classified as his separate property based upon said assets being derived from his pre-marital assets and the fact that the

marital residence is titled in his name alone. The undersigned respectfully disagrees.

While the facts support that Mr. Galloway used his pre-marital funds to acquire property during the marriage, the proof also establishes, via the Doctrines of Commingling or Transmutation, that said pre-marital assets were converted into marital property. The Supreme Court in Langschmidt v. Langschmidt 81 S.W.3d 741, *747 (Tenn.,2000) sets out the criteria for determining whether commingling or transmutation has occurred. Specifically the court in Langschmidt stated the following:

> "In addition to the provisions of Tenn.Code Ann. § 36-4-121(b)(1)(b), courts in ***Tennessee have recognized two methods by which separate property may be converted into marital property: commingling and transmutation.*** Although this Court previously has not addressed commingling and transmutation, several opinions of the Court of Appeals have explained the concepts as follows: *[S]eparate property becomes marital property [by commingling] if inextricably mingled with marital property or with the separate property of the other spouse. If the separate property continues to be segregated or can be traced into its product, commingling does not occur.... [Transmutation] occurs when separate property is treated in such a way as to give evidence of an intention that it become marital property....* The rationale underlying these doctrines is that dealing with property in these ways creates a rebuttable presumption of a gift to the marital estate. This presumption is based also upon the provision in many marital property statutes that property acquired during the marriage is presumed to be marital. The presumption can be rebutted by evidence of circumstances or communications clearly indicating an intent that the property remain separate. 2 Homer H. Clark, *The Law of Domestic Relations in the United States* § 16.2 at 185 (2d ed.1987); *Lewis v. Frances*, No. M1998-00946-COA-R3-CV, 2001 WL 219662, at *8, 2001 Tenn.App. LEXIS 140, at *24-25 (Tenn.Ct.App. March 7, 2001), *perm. app. denied* (Tenn. Oct. 8, 2001); *Sartain v. Sartain*, 03A01-9707-CH-00297, 1998 WL 751462, at *4, 1998 Tenn.App. LEXIS 722, at *9 (Tenn.Ct.App. Oct. 29, 1998); *Hofer v. Hofer*, No. 02A01-9510-CH-00210, 1997 WL 39503, at *3-4, 1997 Tenn.App. LEXIS 74, at *8 (Tenn.Ct.App. February 3,1997); *Pope v. Pope*, No. 88-58-II, 1988 WL 74615, at *3, 1988 Tenn.App. LEXIS 449, at *7-8 (Tenn.Ct.App. July 20, 1988).

As for the case at hand, the proof established that all of Mr. Galloway's premarital assets eventually were converted to marital assets via the doctrines of commingling or transmutation. Specifically,

1. Mr. Galloway's pre-marital personal / business accounts were inextricably commingled with marital income derived from the business during the marriage from 1990 to 1995. Thus, Mr. Galloway failer [sic] to segregate his pre-marital asset from the income derived during the marriage converted said assets into marital property. (see page p6 § 1(i) supra.

2. Furthermore, Mr. Galloway's "commingled" personal / business accounts were also used during the marriage to acquire real property that was titled in their joint names, thus transmuting said funds to marital real property. For example,

> a. In 1995, Mr. Galloway used $150,379 from his "commingled" personal account to purchase the Idaho residence and had said residence deeded in both of the parties names. (see p.7 § 5)
>
> b. In 1996, Mr. Galloway used $44,000 from his "commingled" personal account along with the parties' joint account funds (ie.. proceeds from the Sante Fe and Columbia property sales) to purchased (sic) the Cookeville residence for $135,000; and then deeded said real estate jointly. (see p.8 § 9 supra.)

3. Eventually all of the remaining funds from Mr. Galloway's pre-marital "commingle" bank accounts were deposited in joint marital accounts, thus transmutting [sic] and converting said funds into marital assets. (Husband's tetimony tr.p.187, p. 188 line 2-10)

4. The funds derived from the sale of Mr. Galloway's pre-marital Sante Fe real property and the John Deer farm tractor was converted to marital assets by placing funds in a joint marital account. (see p. 6 §1(ii-iii) & P.8 §8 supra.)

As for the classification of the parties last residence in Burns, Tennessee, the proof established that said property was purchased with funds derived from an joint marital account, but said property was placed in Mr. Galloway's sole name. (see p.9-10 para. 13 supra.). Pursuant T.C.A. § 36-4-121(b)(1)(A) "Marital property" means all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage ....." The proof in the case at hand clearly establishes the property was acquired during the marriage and thus should be classified as marital property unless there is sufficient proof that the parties intended for said property to be converted to Mr. Galloway's separate property. Ms. Galloway testified that it was not her intention for the house to be considered Mr. Galloway's separate property. (Wife's testimony tr.p.38 line 18-25, p.39 line 1-2); while Mr. Galloway testified that "she never objected to it cause ***I told her at the outset when we were reconciling <u>we were going to buy another house</u>*** and that's the way it was going to be and if she didn't like it we wouldn't reconcile, we would proceed with the divorce ..." (Husband's testimony tr.p.141 line 5-20). Based upon the foregoing testimony of the parties (specifically noting that Mr. Galloway stated that "we were going to buy another house"), and the fact that the house was purchased during the marriage with funds from a joint account and the home was used during the marriage

> as the marital residence, the undersigned finds the Burns residence should be classified as marital property.
>
> It should also be noted that Ms. Galloway's pre-marital residence at Columbia was converted to marital property via the Doctrine of Transmutation by executing a Tenancy by the Entireties Deed. (see p.7 § 3; and p.7 § 4 supra.)

Both parties filed exception to the findings of the Special Master, but all exceptions were overruled with the trial court specifically approving the findings of the Special Master.

The Special Master concluded that Appellee's separate property was limited to nineteen items with total value of $1,185, while Appellant's separate property was limited to three items with a total value of $340. All other properties were held to be marital properties, with the Burns, Tennessee, real estate valued at $145,000; the bank accounts of the parties valued at $168,232; investment accounts valued at $19,300; retirement accounts valued at $3,549; vehicles and boats valued at $23,830; furniture valued at $3,515; equipment and tools valued at $670; and guns valued at $1,000 for a total marital estate valued at $369,396. The trial court awarded a value of $183,274 of marital property to Appellee and a value $186,122 of marital property to Appellant. Included within the award to Appellant was the marital home in Burns, Tennessee, valued at $145,000; and, included within the distribution to Appellee was $85,000 ordered by the trial court to be paid to her to make relatively equal the division of marital assets.

It is difficult to see how, under the facts as stipulated by the parties and the clear commingling and transmutation resulting from the actions of both parties, that the trial court can be faulted in this distribution of marital property. The division of marital property by the trial court will not be disturbed on appeal unless it lacks evidentiary support or results from an error of law or a misapplication of statutory requirements. *Thompson v. Thompson*, 797 S.W.2d 599 (Tenn.Ct.App.1990). The trial court's findings with respect to property classification are reviewed *de novo* accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. *Brooks v. Brooks*, 992 S.W.2d 403 (Tenn.1999).

The goal in each case is to divide the marital assets in a fair and equitable manner. *Fulbright v. Fulbright*, 64 S.W.3d 359 (Tenn.Ct.Ap.2001). An exact division is not required. The division made by the trial court in the case at bar is clearly equitable and will not be disturbed on appeal.

Award of attorney's fees to either party is discretionary, and the Court declines to award attorney's fees to either party under the facts of this case. *Fox v. Fox*, 657 S.W.2d 747 (Tenn.1983).

The judgment of the trial court is in all respects affirmed with costs of the cause assessed to Appellant.

WILLIAM B. CAIN , JUDGE